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CHARLES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

NO. 664

PIEDMONT AND NORTHERN RAILWAY COMPANY, PETITIONER,

v.

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, CAROLINA, CLINCHFIELD & OHIO RAILWAY, CAROLINA, CLINCHFIELD & OHIO RAILWAY OF SOUTH CAROLINA, AND CLINCHFIELD NORTHERN RAILWAY OF KENTUCKY, RESPONDENTS.

SUPPLEMENTAL BRIEF FOR PIEDMONT AND NORTHERN RAILWAY COMPANY, PETITIONER.

H. J. HAYNSWORTH,
R. S. HUTCHISON,
W. S. O'B. ROBINSON, JR.,
Counsel for Petitioner.

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SUPPLEMENTAL BRIEF FOR PIEDMONT AND NORTHERN RAILWAY COMPANY, PETITIONER.

Statement of Case.

To the statement of the case contained in the petition for a writ of certiorari (pp. 2-9), petitioner desires to add the following statement of the facts on which it relies in support of the contention that its railway is "an interurban electric railway, which is not operated as a part or parts of a general steam railroad system of transportation":

Until the Commission's ruling of April 3, 1928, in *Proposed Construction of Lines by Piedmont and Northern Railway Company*, 138 I. C. C. 363, petitioner's railway had been officially treated and dealt with by the Interstate Commerce Commission, the U. S. Railroad Administration, the U. S. Labor Board and other federal authorities as an interurban electric railway. (R. 173, 362-365, 450, 451). It has made reports of its operations and finances to the Interstate Commerce Commission under the accounting rules governing electric railways. (R. 365). It was taken over by the government under the proviso contained in the seventh paragraph of Section I of the Federal Control Act of March 21, 1918, (40 Stat. L. 451), including within "Federal Control" interurban electric railways whose principal source of operating revenue was freight traffic (U. S. House Hearings, 66th Congress, First Session, Vol. 15, p. 2796). The Commission on October 12, 1920, ruled informally that it was an interurban electric railway not operated as a part of a general steam railroad system of transportation, and that it was therefore within the exemption contained in Section 20a exempting such railways from the authority of the Commission over the issuance of carrier securities. (R. 362). On December 11, 1920, the U. S. Railroad Labor Board ruled in Decision No. 33, Docket 26-a, that for the same reason it was not subject to the jurisdiction of the Labor Board. (R. 173). It is paid by the Post Office Department for transporting United States mail as an interurban electric railway, in accordance with the order of the Interstate Commerce Commission of August 7th, 1920, in Electric Railway Mail Pay, 58 I. C. C., 455. (R. 361).

Its lines connect and tie in with the street railway systems in the cities and towns through which it operates.

(R. 380). Of its main line mileage 15.13 miles is operated jointly with street car lines. (R. 184). The first properties acquired were the street railway properties in Anderson, Greenville and Charlotte, which were acquired in order that the lines to be built between the cities might be tied in with the street railway systems, thus affording these lines access to and terminals in the principal cities en route and assuring the interurban lines of trackage rights over the street railway systems. (R. 380).

On March 10, 1910, the Greenville, Spartanburg and Anderson Railway Company was incorporated under the general laws of the State of South Carolina. (R. 143). It purchased the existing interurban electric railway between Belton and Anderson, South Carolina, a distance of about 10½ miles, and constructed the line in South Carolina from Greenwood to Spartanburg. (R. 382).

On January 6, 1910, the Piedmont Traction Company was incorporated under the laws of the State of North Carolina as a street railway company, and constructed the line in North Carolina between Gastonia and Charlotte, and also the street railway system in Gastonia. (R. 143, 382).

The Piedmont and Northern Railway Company was incorporated by Special Act of the Legislature approved February 24, 1911, (R. 156), and thereafter the properties formerly owned and operated by the Piedmont Traction Company and the Greenville, Spartanburg and Anderson Railway Company were conveyed to it. These properties included the line from Charlotte to Gastonia, the street railway system in Gastonia, trackage rights over the street railway system in Charlotte, the lines in South Carolina from Greenwood to Spartanburg, and

from Anderson to Belton, and trackage rights over the street railway systems in Anderson and Greenville. (R. 382.)

Petitioner's railway is, and has always been, operated exclusively by electricity as a motive power, (R. 386); and it is not, and has never been, operated as a part of any steam railroad system of transportation. (R. 387).

The voltage used in the operation of petitioner's railway is 1500 direct current supplied through an overhead trolley supported by poles, (R. 310, 387), as compared with 3000 volts direct current or 11,000 alternating current ordinarily used on electrified sections of steam railroads. (R. 347). The volume and character of voltage required on an electric railroad is determined by the character of service to be performed and the volume of traffic to be moved; where traffic is moved in small units and at frequent intervals the lower voltag of 1500 D. C. is suitable and feasible; but where traffic is heavy, moving less frequently and in heavier train loads the higher voltage of 3000 D. C. or 11,000 A. C. is required. (R. 347).

The overhead construction and power supply of petitioner's railway is similar to that which was used on many of the early electric railways constructed about 1902, (R. 310, 311); and differs radically from the overhead construction in use on electrified sections of steam railroads. (R. 312, 348).

The substation capacity on petitioner's railway is approximately 75 Kilowatts per mile, whereas in steam railroad electrification it is never lower than 150 and runs as high as 1000 Kilowatts per mile. (R. 319). The substation capacity is low not only in respect of individual units, but also in respect of the total capacity of the en-

tire road. For example, the total capacity of petitioner's railway consisting of 129 miles is 10,600 Kilowatts, as compared with 36,000 Kilowatts on the electrified section of the Delaware and Lackawanna, consisting of 160 miles. (R. 370).

If petitioner were to change its railway and equipment so as to be able to haul larger trains and use larger locomotives, (such as those used on electrified sections of steam railroads), the whole road would have to be revised, the existing substations abandoned and others built in their place. (R. 370).

Petitioner's signal system is a selective control block system which would not be suitable for use on a main line steam railroad. (R. 311, 376).

Petitioner's locomotives vary in weight from 50 to 100 tons, (R. 316), and are decidedly lighter and smaller than those in use on electrified divisions of steam railroads, (R. 344, 345), and would not be suitable or feasible for use on an electrified division of a steam railroad. (R. 345, 370). All the locomotives are designed so that they can be used on every mile of petitioner's railway, and in this respect also they differ from the practice on electrified divisions of steam railroads where several classes of locomotives are used for different purposes, such as one type for switching operations and another for main line operations. (R. 370). Petitioner's locomotives are the type commonly known as interurban locomotives; they are constructed on swivel type trucks, whereas locomotives on electrified sections of steam railroads have a rigid wheel base. (R. 316, 317).

The passenger cars are motivated by self-contained motor units instead of being drawn by locomotives; they

are lighted in series from the trolley, are equipped with radial drawbars enabling them to make sharp turns; all but six of the twenty-two passenger cars are equipped with double-end control so that they may be operated from either end; and all of them are equipped with multiple unit control so that if two of them are coupled together they may be operated by one motorman. (R. 315). Its passenger cars make frequent stops, averaging 1.2 miles apart. (R. 169). Its freight trains are operated in small units and at frequent intervals; they set out and pick up freight all along the line; and use the street railway lines to pick up and deliver freight within the cities. (R. 172, 179, 373, 374, 375).

Question Presented.

The question presented is whether or not petitioner's railway is "an interurban electric railway, which is not operated as a part or parts of a general steam railroad system of transportation," within the meaning of the language of Section I, Paragraph 22, of the Interstate Commerce Act, as amended by Transportation Act, 1920, (49 U. S. C. A., Sec. I(22)), excluding such railways from the scope of the provisions of Paragraph 18 which prohibits any carrier by railroad subject to the Act from undertaking any extension of its lines or construction of new lines, without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity.

This question is raised by Assignments of Error VI to XXI, (R. 496-502), and by the petition for the writ of certiorari.

ARGUMENT.

V.

The language of Paragraph 22 of Section I of the Interstate Commerce Act, as amended by Transportation Act, 1920, exempting "interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation" from the scope of the provisions of Paragraph 18, being plain and unambiguous, especially when read in connection with the other provisions of the Act dealing with electric railways, leaves no room for a construction rejecting the literal meaning of its terms.

Paragraph 22 makes the test of Federal jurisdiction over the construction and abandonment of lines by interurban electric railways depend solely on whether or not such railways are operated as a part or parts of a general steam railroad system of transportation. If they are so operated the Interstate Commerce Commission has jurisdiction. If they are not so operated jurisdiction is left with the state authorities.

The language of the statute is plain and unambiguous and leaves no room for a construction which would make the jurisdiction of the Commission over the construction of electric railways depend upon the effect which the construction would have in diverting interstate traffic from other carriers by railroad, who are subject to the Act.

In *Crooks v. Harrelson*, 282 U. S. 55, 75 L. ed. 156, the court in disposing of a contention that the literal meaning of a section of the Revenue Act of 1918 should be rejected because it would lead to absurd results, said:

"It is urged, however, that if the literal meaning of the statute be as indicated above, that meaning should be rejected as leading to absurd results, and a construction adopted in harmony with what is thought to be the spirit and purpose of the act in order to give effect to the intent of Congress. The principle sought to be applied is that followed by this Court in *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 36 L. ed. 226, 12 S. Ct. 511; but a consideration of what is there said will disclose that the principle is to be applied to override the literal terms of a statute only under rare and exceptional circumstances. The illustrative cases cited in the opinion demonstrate that to justify a departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the general moral or common sense. Compare *Pirie* v. *Chicago, Title & T. Co.*, 182 U. S. 438, 451, 452, 45 L. ed. 1171, 1178, 1179, 21 S. Ct. 906. And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail. *Treat* v. *White*, 181 U. S. 264, 268, 45 L. ed. 853, 854; 21 S. Ct. 611."

"Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usur-

pation of the latter. *Monson* v. *Chester*, 22 Pick. 385, 387. It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts. See *Re Alma Spinning Co.* L. R. 16 Ch. Div. 681, 686; 7 Eng. Rul. Cas. 589; *Rex* v. *Commissioners of Navigation*, 5 Ad. & El. 804, 816; 111 Eng. Reprint, 1370; *Abley* v. *Dale* (1851) 20 L. J. C. P. N. S. 33, 35. And see generally *Chung Fook* v. *White*, 264 U. S. 443, 445, 68 L. ed. 781, 782, 44 S. Ct. 361; *Commissioner of Immigration* v. *Gottlieb*, 265 U. S. 310, 313, 68 L. ed. 1031, 1033; 44 S. Ct. 528.".

In *United States* v. *Missouri P. R. Co.*, 278 U. S. 269, 73 L. ed. 322, in interpreting Paragraph 4 of Section 15 of the Interstate Commerce Act, as amended by the Transportation Act of 1920, the court, in an opinion by Mr. Justice Butler, said:

"The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construc-

tion. Inconvenience or hardships, if any, that result from following the statute as written, must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority in respect of the establishment of through routes. Construction may not be substituted for legislation. *United States* v. *Wiltberger*, 5 Wheat. 76, 95, 5 L. ed. 37, 42; *United States* v. *Fisher*, 2 Cranch, 358, 386, 2 L. ed. 304, 313; *Lake County* v. *Rollins*, 130 U. S. 662, 670, 32 L. ed. 1060, 1063, 9 Sup. Ct. Rep. 651, *Caminetti* v. *United States*, 242 U. S. 470, 61 L. ed. 442, L. R. A. 1917F, 502, 37 Sup. Ct. Rep. 192, Ann. Cas. 1917B, 1168; *Ex parte Public Nat. Bank*, 278 U. S. 101, ante, 202, 49 Sup. Ct. Rep. 43; *United States* v. *Colorado & N. W. R. Co.*, 15 L. R. A. (N. S.) 167, 85 C. C. A. 27; 157 Fed. 321; 13 Ann. Cas. '893."

In *Sturges* v. *Crowninshield*, 4 Wheat. 122, 202, Chief Justice Marshall said:

"It would be dangerous in the extreme to infer that from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not

intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."

In *Pirie* v. *Chicago Title & Trust Co.*, 182 U. S. 438, 451, Mr. Justice McKenna said:

"It is but one rule of construction that the consequences of a statute may be considered in construing its meaning. The rule may be counterpoised by other rules; it may be prevailed over by one which requires the intent of the statute to be looked for in its words. Where they are clear and involve no absurdity, they are its only expositors. It is not contended that the provisions which we are considering are not clearly expressed adequate to convey a definite meaning. It is true, it is urged that the word 'preference' imports the conscious participation of the creditor and debtor in the same intent. We cannot concur in that view, and we are brought to the consequences of the construction which we have put upon Section 60. It is denominated absurd by appellants. What is the test of absurdity? The contradiction of reason, it may be said, and to make an immediate application to legislation the contradiction of the reason which grows out of the subject-matter of the legislation and the purpose of the legislators. But all legislation is not simple, nor its consequences obvious, or to be controlled, even if obvious. Whether there should be any legislation at all, and its extent and form, may be matters of dispute. Its consequences may be viewed with favor or with

alarm; some regretted, but accepted as inevitable, —accepted as the shadow side of the good. In such situation it is for the legislature to determine, and it is very certain that the judiciary should not refuse to execute that determination from its view of some consequences which, (to use the thought and nearly the words of Chief Justice Marshall), may have been contemplated and appreciated when the Act was passed, and considered as overbalanced by the particular advantages the Act was calculated to produce."

At the time of the adoption of the Transportation Act, 1920, electric railways of the type of petitioner's railway had been treated and described as interurban electric railways under several prior Acts of Congress dealing with electric railways.

Under the Act of June 18, 1910, Chap. 309, 36 Stat. at L., 539, 552, the Commission had established, for freight, through routes and joint rates between interurban electric railways and steam railroads. *Chicago & Milwaukee Electric R. Co.* v. *Illinois C. R. Co.*, 13 I. C. C. 20; *Cedar Rapids & I. C. R. & Light Co.* v. *Chicago & Northwestern R. Co.*, 13 I. C. C. 250; *Louisville Board of Trade* v. *Indianapolis, Columbus & Southern Traction Co.*, 27 I. C. C. 499; *St. Louis, Springfield & Peoria R. R.* v. *P. P. & U. Ry. Co.*, 26 I. C. C. 226; and numerous other cases cited in *United States* v. *Village of Hubbard*, 266 U. S. 474, Note 4.

The Federal Control Act of March 21, 1918, 40 Stat. L., 451, contained the proviso to Paragraph 7 of Section I, "that nothing in this paragraph shall be construed as including any street or interurban electric railway which

has as its principal source of operating revenue urban, suburban or interurban passenger traffic or sale of power, heat and light, or both." Several interurban electric railways, including petitioner's railway, were taken under Federal Control under this proviso of the Act. (House Hearings, 66th Congress, First Session, Volume 15, p. 2796).

On July 2, 1918, Congress passed the Railway Mail Pay Service on Urban and Interurban Electric Railways Act, 40 Stat. L., 748, 39 U. S. C. A., Secs. 569, 570, in which the Commission was empowered and directed to "fix and determine from time to time the fair and reasonable rates and compensation for the transportation of mail matter by urban and interurban electric railway common carriers."

In *Electric Railway Mail Pay*, 58 I. C. C. 455, the Commission complying with this direction filed its report on August 7, 1920, saying:

> "There are three kinds or classes of electric lines, each of which is employed to some extent in the carriage of the mails. They are known as urban or city lines, suburban lines, or interurban lines. Urban lines comprise those operating wholly within cities. * * *
>
> "Interurban lines, as the term implies, run between two or more cities. They are operated in some respects like steam roads, so far as mail transportation is concerned. Many of them do considerable freight and express business in addition to their passenger business."

Petitioner has been paid for transporting United States mail in accordance with the order of the Interstate Commerce Commission made in the Electric Railway Mail Pay Case. (R. 361, 362).

The development of interurban electric roads had become general about 1902; since 1915 they had been required to file with the Commission annual reports of their finances and operations; and in exercising authority over their passenger fares the Commission had made no distinction between those interurban roads which were engaged in the general transportation of freight in addition to their passenger and express business, and those which were not. *United States* v. *Village of Hubbard*, 266 U. S. 474.

In *Chicago & M. Electric R. Co.* v. *Illinois C. R. Co.*, 13 I. C. C. 20, decided in 1908, the complainant (which is referred to in the Village of Hubbard case as an interurban electric railroad) was described in part as follows:

> "The tracks are laid with 80-pound rails and are well ballasted. The culverts and bridges are constructed of reinforced concrete. The record fully discloses and the defendants admit that so far as construction is concerned the complainant is able not only to handle freight in carloads but in trains. . . . The complainant has through routes and joint rates in effect with the Wisconsin Central Railroad Company."

In *Cedar Rapids & I. C. R. Co.* v. *Chicago & N. W. R. Co.*, 13 I. C. C. 250, decided in 1908, and also referred to in the Village of Hubbard case, the complainant was described as follows:

"Its roadbed, as is admitted by the defendant, is constructed in a substantial manner and in conformity with the standard that is usual with the smaller steam railroads in that section of the country. * * * The road crosses 28 well-built bridges and culverts constructed, as the complainant's witnesses state, upon plans that are practically identical with those used by the defendant in similar structures on its lines. In other respects the record satisfactorily shows that the complainant's line is capable of moving freight in trainloads as well as in carloads."

In *St. Louis, Springfield & Peoria R. R., et al,* v. *P. & P. U. Ry. Co.*, 26 I. C. C. 226, decided in 1913, the complainants which constituted the Illinois Traction Company were referred to by the Commission as "lines of interurban electric railway," operating 418 miles of railway and extending from St. Louis, Missouri, on the South, to Peoria, Ill., on the North, and to Danville and Ridge Farm, Ill., on the East, and in part were described as follows:

"The complainants conduct a general passenger and freight business, and their lines are standard gauge with rails and ballast of regular steam-road standard. * * * It is apparent from the evidence that the complainants' equipment is standard and such as may be interchanged in interstate traffic, and that their roadbed and bridges are built so as to permit the passage over them of standard railroad cars."

In *Chicago, Ottowa & Peoria Ry. Co.* v. *Chicago, Northwestern Ry. Co.*, 33 I. C. C. 573, decided in 1915, the Commission said:

> "Our authority upon a proper showing to require the establishment by steam railroads of through routes and joint rates with interurban electric railroads engaged in interstate transportation of freight has long been settled."

In *Louisville Board of Trade* v. *Indianapolis, Columbus and Southern Traction Co., et al*, 27 I. C. C. 499, decided in 1913, the Commission established through routes and joint rates "over interurban electric lines between Louisville and points in Indiana." At page 504, the Commission said, "these companies are common carriers and are engaged in interstate traffic; it is therefore their duty, under express and affirmative provisions in the act, to provide cars and other reasonable facilities necessary properly to serve the public."

This history of interurban electric railways "may be noticed in confirmation of the meaning conveyed by the words used" in paragraph 22. *United States* v. *Missouri P. R. Co.*, 278 U. S. 269, 278.

In several sections of the Transportation Act, 1920, Congress provided expressly for the exclusion of certain electric railways from the operation of the powers conferred on the Commission. In each section it used plain language to express its intent. Had Congress intended to make the exclusion of an interurban electric railway from the provisions of paragraph 18 depend upon the character and volume of its traffic, or on whether or not it is operated in competition with steam railroads, it would have used appropriate language to express this

purpose. The failure of Congress to make the exclusion depend upon either of these considerations shows that Congress had no such purpose.

Conclusion.

It is respectfully submitted that the decree below should be reversed.

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CHARLOTTE, N. C., April 2, 1932.